IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-828

FRANK A. GUNTHER, HERMAN EIG AND SIDNEY J. BROWN (SUCCESSORS TO SHELDON E. BERNSTEIN, LEONARD S. MELROD AND HERMAN EIG), PARTNERS D/B/A SAVAGE JOINT VENTURE, *Petitioners*

V.

THE MARYLAND-NATIONAL CAPITAL PARK AND PLANNING COMMISSION, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF SPECIAL APPEALS OF MARYLAND

BRIEF FOR PARK AND PLANNING COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland (Pet. App. 1a-3a), affirming on respondent's behalf the unreported opinion of the Circuit Court for Montgomery County, Maryland (Pet. App. 5a-9a), and the Order of the Court of Appeals of Maryland denying a petition for a writ of certiorari "as there has been no showing that review by certiorari is desirable and in the public interest" (Pet. App. 10a) are not reported.

JURISDICTION

The Order of the Court of Appeals of Maryland denying the petition for a writ of certiorari to the Court of Special Appeals was entered on July 13, 1977. On January 10, 1978, the Clerk of the Supreme Court extended the time for filing this brief in opposition to January 25, 1978. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "* * * nor shall any State deprive any person of * * * property, without due process of law * * *."

QUESTION PRESENTED

Whether petitioners were denied due process of law by respondent's disapproval of a final record plat of a non-approved preliminary subdivision plan.

STATEMENT

A review of the Maryland court opinions in this case (Pet. App. 1a-3a, 5a-9a) show that (1) this is a subdivision, not a zoning, case, and (2) this is a simple case of statutory construction: can a *preliminary* subdivision plan, in Montgomery County, be approved automatically by default if respondent's Montgomery County Planning Board does not act within 60 days of submission. The Maryland courts answered "no," given the language of Article 66D of the Annotated Code of Maryland (sections 7-116(b), 7-117), the County Subdivision Ordinance (especially sections 50-2, 50-34, 50-35, 50-37(b) and (c), Montgomery County Code, 1972, as amended), and *Maryland-National Capital Park and Planning Commission v. Silkor Development Corporation*, 246 Md. 516, 229 A.2d 135 (1967).

Petitioners' trial court petition (Pet. App. 11a-17a) was contradicted clearly by a demurrer, a preliminary response challenging the legal sufficiency of a petition.[1] Because the trial court treated the demurrer as a motion for summary judgment and disposed of the case in that fashion (Pet. App. 5a), no answer to the petition was required or filed.

Although petitioners incessantly claim "delay" by respondent Commission in the processing of petitioner's subdivision plan, that tiresome allegation was *never* supported by the record. The record did establish that petitioners *never* sought, through respondent or by petitioning in court for a writ of mandamus, to get its *preliminary* subdivision plan before the Planning Board for a decision *on its merits* because petitioners had been informed by respondent's planning staff that the preliminary plan was defective on several counts.

Under the County Subdivision Ordinance, a *final* record plat cannot be approved (by the Planning Board or by default) unless it complies with a preliminary subdivision plan previously *approved by* the Board (section 50-37(b); Pet. 5). Instead of curing the preliminary plan's defects and submitting the plan to the Planning Board for action, petitioners simply waited several months and then submitted a final record plat, claiming the preliminary plan had been approved by default, as a way of trying to circumvent the effective date of the County Council's comprehensive downzoning of upper Montgomery County, which included petitioners' property.

The following chronology of critical events, based on the record, should make clear what really happened and why the petition should be denied:

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[1]Maryland Rule of Procedure 345(d) then provides that "If a demurrer is overruled, the party demurring shall have the right to plead to the merits without withdrawing such demurrer, and upon an appeal he shall be entitled to have the questions of law arising thereunder decided as fully as if he had not pleaded to the merits."

October 2, 1973 — Montgomery County Council, sitting as District Council, enacted rural zone,[2] with grandfather clause for preliminary subdivision plans submitted to Planning Board in accordance with section 50-34 by June 4, 1974 and recorded by July 1, 1975;

May 31, 1974 — petitioners (as applicant) submitted to respondent's planning staff a preliminary subdivision plan for 968 acres, proposing 1,200 residential lots in R-200 zone in upper County;

June 17, 1974 — informal Subdivision Review Committee (members from various County agencies, chaired by John Broda, chief of Planning Board's subdivision office) discussed plan with applicant's submitting engineer and understood at that time that applicant would not pursue processing of the plan to the Planning Board until numerous problems and deficiencies with the plan were resolved by applicant;

August 20, 1974 — District Council comprehensively rezoned 119,000 acres of the upper County, including petitioners' property, to the rural zone;

December 2, 1974 — 5 and 1/2 months after the June meeting and *after* the rezoning, petitioners' engineer sent letter to Broda both requesting Planning Board approval of the preliminary plan and then stating alternatively that petitioners deemed the plan automatically approved "under the rule enunciated in *Silkor*" (Pl. Ex. B);

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[2]The zone was held constitutional under the Fourteenth Amendment on September 23, 1977, by the Circuit Court for Montgomery County in *W.C. and A.N. Miller Development Co., et al. v. Montgomery County, et al.*, Law Nos. 40854, 40855, 40866, 40868, 40869, citing, *inter alia*, *Montgomery County, et al. v. Woodward & Lothrop, Inc., et al.*, 376 A.2d 483 (1977). Two of the five plaintiffs in *Miller* have appealed to the Maryland Court of Special Appeals.

December 12, 1974 — Broda wrote back, stating that since the June 17 meeting, he understood the applicant did not wish to pursue processing until it resolved the problems raised in June, but that if this were not the case now, to "please *let me know* and I will be more than happy to make the necessary arrangements to present the plan as submitted to the Planning Board at the *next* meeting." (emphasis added) (Pl. Ex. A);

February 10, 1975 — 2 months later, petitioners *instead* submitted a final plat covering a 40 acre portion of the 968 acres proposed to be subdivided (Pl. Ex. C);

February 11, 1975 — Broda wrote applicant that the submitted plat had been rejected by staff pursuant to County Code section 50-37(a)(2) (Pet. 5), for the reason that it did not conform to a preliminary plan that had been approved by the Planning Board, as required by section 50-37(b) (Pet. 5) (Pl. Ex. D);

April 11, 1975 — 2 months later, the final plat was resubmitted for Board action pursuant to section 50-37(a)(3) (Pet. 5) (Pl. Ex. G);

May 1, 1975 — the Planning Board, with a record plat submitted, thereupon disapproved the preliminary subdivision plan submitted on May 31, 1974, and hence, the record plat;

May 6 and 7, 1975 — John Broda notified applicant of the Board's actions on the preliminary plan and final plat and the reasons therefor (Pl. Ex. H, I).

ARGUMENT

As the Maryland courts so clearly found, this case posed simply a statutory construction question regarding the Montgomery County subdivision ordinance, namely, can a preliminary subdivision plan be approved by default if respondent's Montgomery County Planning Board does not act on the pre-

liminary plan within sixty days of submission. The language and rationale of sections 7-116(b) and 7-117 of respondent's enabling act (Article 66D of the Annotated Code of Maryland), of sections 50-2, 50-34, 50-35, 50-37(b) and (c) of the local subdivision ordinance, and of the definitive and controlling *Silkor* case, *supra,* all required a negative answer. Petitioners' persistent allegation of "administrative delay," never supported by the factual record (because it never occurred), has been used consistently to try to obfuscate the statutory construction issue that petitioners sought to avoid and could not circumvent.

This was not nor ever has been a zoning case. Nor was the issue of "denial of due process of law," raised by petitioners before this Court with a vague reference to the Fourteenth Amendment, an issue addressed to the Court of Special Appeals of Maryland. In its brief submitted to that court, petitioners presented four questions for decision:

> "I. Did the lower court misconstrue Section 50-35 of the Montgomery County subdivision regulations by failing to recognize the implications of its language and the import of its underlying policies, which dictate that the provision is to be read as being mandatory?
>
> II. Did the lower court err in granting a summary declaratory judgment in favor of the defendant-appellee, the Maryland-National Capital Park and Planning Commission, by failing to consider a material factual dispute between the parties?
>
> III. Does the doctrine of equitable estoppel operate so as to bar the defendant-appellee, MNCPPC, from disapproving the petitioner-appellants' preliminary subdivision plan and final record plat?
>
> IV. Did the petitioner-appellants fully comply with the letter and spirit of the Montgomery County subdivision regulations, thereby giving them the right to relief adequate to ensure the approval of their final record plat and realization of their Savage Tract development plan?" (Brief of Appellant at 2).

Where a question is not raised in state court, that question is not open for review on a petition for certiorari. *Ellis v. Dixon,* 349 U.S. 458, rehearing den., 350 U.S. 855.

Indeed, no state court in this non-federal statutory construction case "has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court." Rule 19, Supreme Court Rules. Nor does this case involve any question likely to recur in other cases. Thus under Rule 19, there is no "special and important reason" for granting review of this case. Even if there were, there would be no denial of due process.

The only delays evidenced by the record were those quietly induced by petitioners in their tortuous attempt, given a defective preliminary plan, to avoid the unmistakable requirements of the subdivision ordinance that the Planning Board review preliminary subdivision plans, receiving technical recommendations from other government agencies and its professional staff. Petitioners carried on this charade in order to thereby possibly "beat out" the comprehensive rezoning which included their property. If there was "purposeful delay" running as a thread throughout this whole affair, it lay not with respondent Commission. This was an open-and-shut case of local statutory construction that has no federal or national import whatsoever.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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January 1978

Certificate of Service

I hereby certify on this twenty-fifth day of January, 1978, that three copies of this brief in opposition were mailed first class postage prepaid to counsel for petitioners, James vanR. Springer, Dickstein, Shapiro & Morin, 2101 L Street, N.W., Washington, D.C. 20037.

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